

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

FOUZIA EL BAKKAL, an individual,

Plaintiff,

v.

COSTCO WHOLESALE CORPORATION,  
a foreign corporation, doing businesses  
as COSTCO; DOE STORE MANAGERS I  
through X; DOE STORE EMPLOYEES I  
through X; DOE OWNERS I through X;  
DOE PROPERTY MANAGERS I through  
X; DOE MAINTENANCE EMPLOYEES I  
through X; DOE JANITORIAL  
EMPLOYEES I through X; ROE  
PROPERTY MANAGERS XI through XX;  
ROE MAINTENANCE COMPANIES XI  
through XX; ROE OWNERS XI through  
XX; ROE EMPLOYERS XI through XX  
DOES XXI through XXV; ROE  
CORPORATIONS XXV through XXX;  
inclusive jointly severally,

Defendants.

Case No. 2:22-cv-01615-ART-BNW

ORDER

This is a personal injury slip and fall case which was removed from the Eighth Judicial District Court of the State of Nevada to this Court on September 23, 2022. Before the Court are: (1) Plaintiff Fouzia El Bakkal's motion to remand (ECF No. 9); (2) Plaintiff's amended motion to remand (ECF No. 18); (3) Plaintiff's amended motion to file an amended complaint (ECF No. 20); (4) Defendant Costco Wholesale Corporation's motion to strike Plaintiff's amended motion to remand (ECF No. 22); and (5) Plaintiff's first motion for leave to file an additional amended motion to amend complaint and remand (ECF No. 32). For the reasons set forth in this order, Plaintiff's motion to file an amended complaint (ECF No. 20) is granted in part and Plaintiff's motion to remand (ECF No. 18) is granted. Plaintiff's first motion to remand (ECF No. 9) is denied as moot, and the Court declines to

1 decide Plaintiff's motion for leave to file an additional motion to amend complaint  
2 and remand (ECF No. 32). Also outstanding are Defendant Costco Wholesale  
3 Corporation's motions to compel (ECF Nos. 36, 46) and Plaintiff's motion for  
4 protective order (ECF No. 37), which the Court declines to decide.

5 **I. BACKGROUND**

6 Plaintiff, a Nevada resident, filed a complaint in the Eighth Judicial District  
7 Court of the State of Nevada on December 14, 2021. (ECF No. 1-2 at 16.) Initially,  
8 Plaintiff named Melisa Landa in the complaint, who Plaintiff believed to be the  
9 store manager at the time of Plaintiff's alleged injury, then during the Eighth  
10 Judicial District Court proceedings Plaintiff agreed to dismiss Melisa Landa after  
11 learning that she was not actually working as the manager at that time. (ECF No.  
12 1-9.) Following the dismissal of Melisa Landa, Defendant Costco Wholesale  
13 Corporation ("Costco") removed the case to this Court. (ECF No. 1.)

14 Plaintiff filed a motion to remand on October 21, 2022, which argues that  
15 remand is appropriate since Plaintiff names Doe Store Managers as defendants  
16 and Defendant Costco has not shown that the Doe Store Manager is not a Nevada  
17 resident. (ECF No. 9.) At that time, Plaintiff did not know the identity of the store  
18 manager. On January 12, 2023, Plaintiff filed an amended motion to remand  
19 which included the identity of the store manager working at the time of the alleged  
20 injury, Eric De La Cruz, a Nevada resident. (ECF No. 18.) That same document  
21 also served as Plaintiff's motion to amend complaint to substitute Eric De La Cruz  
22 and to add a claim of negligence per se and was filed in a parallel filing the same  
23 day (ECF No. 17), but that filing was denied due to failure to include a meet-and-  
24 confer certification (ECF No. 19), which led Plaintiff to file an amended motion to  
25 amend complaint on January 17, 2022 which also sought addition of assistant  
26 store manager Lisa Gehres (ECF No. 20). On January 27, 2023, Defendant Costco  
27 filed a motion to strike Plaintiff's amended motion to remand, arguing that  
28 Plaintiff's amended motion constitutes a supplemental filing filed without leave

1 of Court and that Plaintiff improperly joined two motions into one. (ECF No. 22.)

2 On March 28, 2023, Plaintiff filed a motion for leave to file an additional  
3 amended motion to amend complaint and remand. (ECF No. 32.) In Plaintiff's  
4 proposed amended motion to amend complaint and remand, Plaintiff seeks to  
5 substitute for Doe and Roe defendants Club Demonstration Services, Inc., and  
6 Cynthia Hanna. Plaintiff explains that Club Demonstration Services, Inc. was the  
7 company serving food samples in the Costco location where Plaintiff was allegedly  
8 injured and that Cynthia Hanna was the employee who may have been jointly  
9 responsible, along with Defendant Costco, for the area in which Plaintiff was  
10 allegedly injured. Addition of these parties would destroy diversity jurisdiction.

## 11 **II. DISCUSSION**

12 A plaintiff can challenge removal with a motion to remand. The removal  
13 statute is strictly construed against removal jurisdiction. *Hansen v. Group Health*  
14 *Coop.*, 902 F.3d 1051, 1056 (9th Cir. 2018). "The removing defendant bears the  
15 burden of overcoming the 'strong presumption against removal jurisdiction.'" *Id.*  
16 at 1057 (citing *Geographic Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka*, 599  
17 F.3d 1102, 1107 (9th Cir. 2010)).

18 "If after removal the plaintiff seeks to join additional defendants whose  
19 joinder would destroy subject matter jurisdiction, the court may deny joinder, or  
20 permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e).  
21 "Legislative history confirms that Congress intended 28 U.S.C. § 1447(e) as a  
22 solution to allow joinder of a non-diverse Doe defendant." *Valdez v. Home Depot*  
23 *U.S.A., Inc.*, 2022 WL 4137691 at \*3 (N.D. Cal. Aug. 25, 2022) (citing H.R. Rep.  
24 No. 100-889 at 71); *see also Bartfeld v. AMCO Ins. Co.*, 2022 WL 16698687 (N.D.  
25 Cal. Nov. 3, 2022) (citing same). District courts have discretion to permit an  
26 amendment destroying diversity. Factors considered by district courts in  
27 exercising this discretion include: (1) whether the party sought to be joined is  
28 needed for just adjudication and would be joined under Fed. R. Civ. P. 19(a); (2)

1 whether the statute of limitations would prevent the filing of a new action against  
2 the new defendant in state court; (3) whether there has been an unexplained  
3 delay in seeking to join the new defendant; (4) whether plaintiff seeks to join the  
4 new party solely to defeat federal jurisdiction; (5) whether denial of the joinder  
5 would prejudice the plaintiff; (6) the strength of the claims against the new  
6 defendant. *Henley v. Smiths Food & Drug Ctrs., Inc.*, 2014 U.S. Dist. LEXIS 63087,  
7 \*3-4 (D. Nev May 6, 2014). In the Doe defendant context, district court decisions  
8 “favor[] remand where the plaintiff’s descriptions of the Doe defendants provide a  
9 reasonable indication of their identity, the relationship to the action, and their  
10 diversity-destroying citizenship.” *Valdez v. Home Depot U.S.A., Inc.*, 2022 WL  
11 4137691, at \*3 (N.D. Cal. Aug. 25, 2022) (internal quotations omitted).

12 Here, Defendant Costco challenges Plaintiff’s motion to amend to add Eric  
13 De La Cruz on both procedural (ECF No. 22) and substantive (ECF No. 24)  
14 grounds. On the former, Defendant Costco argues that Plaintiff’s amended motion  
15 to remand is a “fugitive document” since it is effectively a supplement to Plaintiff’s  
16 earlier motion to remand and supplementation requires leave of Court under  
17 Local Rule LR 7-2(g). As Plaintiff’s counsel acknowledges, the proper proceeding  
18 under LR 7-2(g) is to seek leave of Court to provide supplementary information.  
19 Nonetheless, the Court agrees with Plaintiff that supplementation is warranted  
20 and was timely pursued following Defendant Costco’s disclosure of the identity of  
21 the store manager. Defendant Costco also argues that Plaintiff violated Local Rule  
22 IC 2-2(b) for containing multiple types of relief within one motion. This rule  
23 concerns procedures for electronically filing in CM/ECF and requires that a  
24 separate event be selected for each type of relief requested. Plaintiff complied with  
25 this requirement by filing the document as a motion to amend complaint and as  
26 a motion to remand. (ECF Nos. 17, 18, 20.) Defendant Costco’s motion to strike  
27 (ECF No. 22) is denied.

28 Substantively, Defendant Costco argues that Plaintiff should not be

1 permitted to amend to substitute Eric De La Cruz and Lisa Gehres as Doe Store  
2 Managers because the claims against them are duplicative of the respondeat  
3 superior claim against Defendant Costco, making substitution of these individual  
4 unnecessary for just adjudication of Plaintiff's claims. Defendants also argue that  
5 substitution is inappropriate because Plaintiff's original complaint does not  
6 sufficiently describe the actions of the Doe Store Managers for the purposes of  
7 Nevada's state law test for relation back of a substituted defendant for statute of  
8 limitations purposes. Defendant Costco points out that the statute of limitations  
9 would prevent the filing of a new action against these individuals in state court.

10 The Court finds that substitution of Eric De La Cruz and Lisa Gehres is  
11 appropriate in this case, necessitating remand. Although Plaintiff may have a  
12 viable claim against Defendant Costco and this claim may be based on vicarious  
13 liability, it is also axiomatic that an employer's vicarious liability does not  
14 preclude individual tort liability on behalf of the employees. Furthermore, the  
15 Court is not aware of any stipulation from the parties indicating that Defendant  
16 Costco concedes that Eric De La Cruz and Lisa Gehres were acting within the  
17 scope of their employment. *See Henley*, 2014 U.S. Dist. LEXIS 63087 at \*5-6. The  
18 remaining factors favor substitution or are neutral. Plaintiff promptly sought  
19 substitution after learning the identities of the store managers. Plaintiff does not  
20 seek to join the store managers solely to defeat diversity: Plaintiff originally named  
21 Melisa Landa as the store manager, showing that Plaintiff intended to proceed  
22 against the store manager before the case was removed. Although the exact  
23 strength of Plaintiff's claims against the store managers is not apparent, they are  
24 not related to the case "only tangentially" since the store managers allegedly had  
25 control of the area where Plaintiff was allegedly injured. *Hardin v. Wal-Mart*  
26 *Stores, Inc.*, 813 F. Supp. 2d 1167, 1174 (E.D. Cal. 2011), *aff'd in part*, 604 F.  
27 App'x 545 (9th Cir. 2015) ("Courts disallow joinder of non-diverse defendants  
28 where those defendants are only tangentially related to the cause of action or

1 would not prevent complete relief.”) (internal quotations omitted).

2       Regarding the statute of limitations, Fed. R. Civ. P. 15(c)(1)(A) provides that  
3 an amendment to a pleading relates back to the date of the original pleading when  
4 the law that provides the applicable statute of limitations allows relation back.  
5 As the parties both point out, the Supreme Court of Nevada has set forth a three-  
6 part test for relation back of a Doe defendant. Relation back is appropriate when  
7 the plaintiff has: (1) pled fictitious or Doe defendants in the caption of the  
8 complaint; (2) pled the basis for naming defendants by other than their true  
9 identity and clearly specified the connection between the intended defendants  
10 and the conduct, activity, or omission upon which the cause of action is based;  
11 and (3) exercised reasonable diligence in ascertaining the true identity of the  
12 intended defendants and promptly moved to amend the complaint in order to  
13 substitute the actual for the fictional. *Nurenberger Hercules-Werke GMBH v.*  
14 *Virostek*, 107 Nev. 873, 881, 822 P.2d 1100, 1106 (1991), *abrogated on other*  
15 *grounds by Costello v. Casler*, 127 Nev. 436, 254 P.3d 631 (2011). Here, Plaintiff  
16 pled that the Doe Store Managers “negligently and carelessly [...] maintained,  
17 operated, occupied, and controlled the said premises [...] so as to cause and allow  
18 an unreasonably hazardous and dangerous premises and such negligence  
19 caused injury to [Plaintiff].” (ECF No. 1-2 at ¶ 13.) This is sufficient to allow  
20 relation back.

### 21 **III. CONCLUSION**

22       Since the Court lacks subject matter jurisdiction due to the substitution of  
23 Eric De La Cruz and Lisa Gehres, the Court declines to decide: (1) whether  
24 Plaintiff should be permitted to add a claim of negligence per se; (2) whether to  
25 permit substitution of Club Demonstration Services, Inc. and Cynthia Hanna for  
26 Doe and Roe defendants (ECF No. 32); (3) Defendant Costco’s motions to compel  
27 (ECF Nos. 36, 46); and (4) Plaintiff’s motion for protective order (ECF No. 37).

28       Plaintiff’s first motion to remand (ECF No. 9) is denied as moot.

1 Plaintiff's amended motion to file an amended complaint (ECF No. 20) is  
2 granted with respect to the substitution of Eric De La Cruz and Lisa Gehres for  
3 Doe Store Managers.

4 Plaintiff's amended motion to remand (ECF No. 18) is granted.

5 The Clerk of Court is directed to administratively close this case.

6  
7 DATED THIS 17<sup>th</sup> day of July 2023.

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11 ANNE R. TRAUM  
12 UNITED STATES DISTRICT JUDGE  
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